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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY 
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No. 49135-4-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

MAURICE CRAIN,

Appellant,

v.

STATE OF WASHINGTON; DEPARTMENT OF SOCIAL AND
HEALTH SERVICES,

Respondents.

APPELLANT'S REPLY BRIEF

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I. APPELLANT'S REPLY ARGUMENT

A. There is more than Sufficient Comparator Evidence Presented to the Trial Court to Warrant Denial of Summary Judgment with Respect to Plaintiff's Disparate Treatment/Termination Claim.

1. A Plaintiff in a Discrimination Claim Pursuant to RCW 49.60. et seq. can Defeat a Motion for Summary Judgment by Presenting Evidence Sufficient to Create a Question of Fact as to Whether or Not a Discriminatory/Retaliatory Animus at Least in Part Motivated the Adverse Employment Decision.

Western State Hospital ("WSH") and the Department of Social and Health Services ("DSHS") decision to terminate Appellant, Maurice Crain, was based on his African American race, as he and other African Americans were targeted for the death of a patient who later died at St. Clare Hospital. Crain, one of the first to respond to this emergency, was not even a medical provider and the immediate location of the choking incident was saturated with actual medical providers (doctors, nurses) who failed to respond or act at all and were not terminated or disciplined.

The blame for R.K.'s death was on three African Americans present and one Caucasian nurse (Diane Parsons-Appellant's wife). Crain was targeted for his alleged negligence and ethical violations by WSH and DSHS, as were a handful of other African American employees who were present for patient R.K.'s choking incident. R.K. was saved at WSH, largely due to the fast actions of Appellant. WSH Chief Executive Officer

Ronald Adler used this event as a pretext to “clean house” and investigate with the intent to terminate Crain and other African American staff. Appellant was (1) cleared of any violations after a thorough investigation by the Department of Health (“DOH”), (2) cleared by Washington State Patrol (“WSP”), and (3) cleared by Pierce County Prosecutor Philip K. Sorenson. This evidence is significant and material because by all accounts, Appellant did nothing wrong in his response to the patient’s choking incident and certainly did not warrant termination.

Victoria David, an African-American woman and a Registered Nurse Level 3 (“RN3”) was forced to resign following the choking incident. CR711. James Smith, an African American male in the same position as Appellant, was also terminated related to this event. CR 593. The only employees terminated related to this event were African American or the spouse/partner of an African American employee.

Non-African American employees who were medical providers who observed the patient during the choking event were not terminated. The video Log of Ward F1 for September 6, 2012 provides a finder of fact with comparative evidence that demonstrates the point that non-African Americans such as PSAs Katherine Paulina (of Pacific Islander descent) and Roberta Lopez (of Latin American descent) passed over patient R.K. without physically or verbally checking on his condition or providing him

any care.¹ Both PSA Katherine Paulina (of Pacific Islander descent) and PSA Roberta Lopez (of Latin American descent), were back to work following the investigation after a mere three months of reassignment, and there is no known evidence of any internal letter of admonishment or reprimand or intent to discipline ever issued to either of them in their respective personnel files, even as the African Americans were being subjected to the machinery of State interagency investigation. (Sealed Record/CR777), CR607, CR664.

Joseph Laureta, Filipino, RN2 who was present as Appellant and RPN Diane Parsons initially responded to the choking of patient R.K., never received any reassignment, discipline, letter of admonishment or reprimand whatever, and was never suspended without pay pending any investigation. CR486. Former Chief Executive Officer Ronald Adler (“CEO Adler”) identified additional individuals who were placed under investigation following the choking incident, putatively on the basis that they walked by patient R.K. without assessing his condition. CR433. Both of the other people investigated following the death of patient R.K. were African-American, and had exceedingly little to do with the events as they unfolded, despite others who were not African American who were in

¹ CR571, CR422, CR440, CR449, CR456, CR475, CR482, (Sealed Record/CR780), CR495, CR502, CR509, CR520, CR526, CR540, CR545, CR549, CR568, CR560, CR583, CR580, CR586, CR603, CR609, CR694, CR686, CR705, CR711, CR188.

view of R.K.'s baseline, comfort zone behavior that day and even stepped over R.K. as a matter of course. CR434, CR476, (Sealed Record/CR774)

These are the only relevant comparators. Margaret Karimi, a non-permanent Psychiatric Security Attendant, was not terminated, her contract just was not renewed.

As clarified in *Alonso*, the issue for summary judgment purposes is whether or not there is sufficient evidence by which a reasonable jury could conclude:

a. "Discriminatory motive was a significant or substantial factor in the employment decision relating to [plaintiff]". In order to defeat a motion for summary judgment "a plaintiff need only produce evidence that supports a reasonable inference that [is protected class status] was the motivating factor for the [adverse employment decision ...]", citing to *Doe v. Department of Transp.*, 84 Wn. App. 143, 149, 931 P.2d 196, review denied, 132 Wn. 2d 1012, 940 P.2d 653 (1997).

Such an analysis is consistent with what is required under the terms of WPI 330. et. seq. According to *Alonso*, plaintiff may establish a discriminatory motive either by "direct evidence" (which would include derogatory remarks directed toward a protected status), or by utilizing the burden shifting test initially adopted by the United States Supreme Court

in *McDonnell Douglas v. Grenn*, 41 U.S. 792, 93 S. Ct. 1817, 36 L.Ed.2d 668 (1973).²

Under the terms of the *Alonso* opinion, if there is "direct evidence" the plaintiff, nor the Court, need address the *McDonnell Douglas* burden shifting analysis, even at the summary judgment stage. Thus, if there is "direct evidence" within the record, then the applicable standards are essentially the same as set forth within WPI 330.010.

As suggested by respondent arguments there appears to be a conflict amongst the divisions of our appellate courts with respect to the interplay between the *McDonnell Douglas* pretext standards and the ultimate burden of proof (the *Mackey* standard) when summary judgment in cases brought under RCW 49.60 are at issue. In *Scrivener v. Clark*

² In *Alonso* the court clarified the derogatory comments or slurs indicative of bias, constitute "direct evidence" of a discriminatory motive. Thus according to *Alonso* once such derogatory comments are submitted into evidence a plaintiff need only establish that (1) the defendant employer acted with a discriminatory motive and (2) the discriminatory motive was a significant or substantial factor in the employment decision. Citing to *Kastanis v. Educ. Employment Credit Union*, 122 Wn. 2d 483, 491, 859 P.2d 26, 865 P.2d 507 (1993). For what it's worth plaintiff respectfully disagrees with that aspect of the *Alonso* analysis. It is respectfully suggested that to some degree anything short of an admission by the employer that an inappropriate factor came into play in the employment decision would constitute "circumstantial evidence" as opposed to "direct evidence". The reason is because if derogatory or bias comments were made even by the ultimate decision maker which are reflective of an illegal motivation the fact that such comments were made, without more, does not provide "direct" proof that an illegal factor came into the employment decision. Nevertheless it is extremely **strong circumstantial evidence** of a discriminatory intent, particularly when such comments are made by individuals involved in the adverse employment decision either directly or indirectly, such as occurred here. Obviously, such direct statements (admissions) rarely if ever occur. See *de Lisle v. FMC Corp.*, 57 Wn. App. 79, 786 P.2d 839 (1999); see also *Sellstad v. Washington Mutual*, 69 Wn. App. 852, 864, 851 P.2d (1993) citing *Loeb v. Textron*, 600 F.2d 1003, 1014 (1st Cir. 1979).

College, 176 Wn. App. 405, 412, 309 P.3d 613 (2013) Variant 2 was critical of the Division 1 opinion in *Rice v. Offshore Sys., Inc.*, 167 Wn. App. 77, 272 P.3d 865 (2012) because Division 1 appears to have abandoned any notion that, at the summary judgment stage, a plaintiff is not required to utilize the *McDonnell Douglas* burden shifting analysis but rather can rely on whatever evidence may be available establishing the existence of a question of fact with respect to an illegal motive underlying an adverse employment decision. Presumptively the clarification provided in *Alonso* was in order to provide guidance as to how a litigant should approach summary judgment in employment discrimination cases. Unfortunately, a utilization of any system which is dependent upon the categorization of the "types" of evidence being utilized does nothing but create confusion and has a grave potential of undermining the purposes of our laws against discrimination by denying access to the courts to a plaintiff that otherwise has a meritorious case no matter how his or her evidence might characterize.

Such a categorical approach which relies on the characterization of evidence as being either "direct" versus "circumstantial" is potentially unworkable and is an approach which should be abandoned. Application of such standard creates needless confusion and invites efforts "pigeon hole" admissible evidence of discriminatory tasks into one standard or

another by a party. Thus, the ultimate test regardless of what kind of evidence is submitted always should remain "the direct evidence" test which is consistent with the ultimate burden of proof which an employment plaintiff must meet at time of trial. Otherwise, there is grave potential that meritorious claims will be lost based on jurisprudential dogma and crabbed efforts at characterization. This kind of categorical approach becomes extremely problematic in cases such as this, where plaintiff presented a combination of both "direct" and circumstantial evidence supportive of her claim.

The *McDonnell Douglas* test was "never intended to be rigid, mechanized or ritualistic, nor is it the exclusive means of proving discrimination." See, *Fulton v. GSHS*, 169 Wn. App. 137, 132, 279 P.3d 500 (2012), citing to, *U.S. Postal Service Board of Governors Serv. v. Aikens*, 460 U.S. 711, 715, 103 S.Ct. 1473, 75 L. Ed. 2d 403 (1983). Further, the defendant's position that the *McDonnell Douglas* test somehow controls and trumps the ultimate burden of proof is illogical and makes no jurisprudential sense. The purpose of the *McDonnell Douglas* test was to aid victims of discrimination in getting their cases to court and was not intended to be a hindrance to such access by placing a more difficult and complex burden onto the plaintiff at the summary judgment stage that otherwise did not exist at time of trial. Not always, the use of

such an approach more often than not will place a greater burden on the employment discrimination plaintiff at the summary judgment stage that otherwise would be applicable at time of trial. This approach defies common sense.

The reason why such an approach defies common sense is because of it is inconsistent with command that RCW 49.60. et. seq. be subject to liberal construction. See RCW 49.60.020. As has been repeatedly recognized by Washington's Appellate Courts, because of such a command of liberal construction summary judgment is rarely appropriate in discrimination cases. See *Frisino v. Seattle School Dist. No. 1*, 61 Wn. App. 765, 249 P.2d 1044 (2011); *Johnson v. Chevron, U.S.A., Inc.*, 159 Wn. App. 18, 244 P.3d 438 (2010). Similarly because of the statutory mandate of liberal construction appellate courts should be extremely reticent to construe this statute in a manner which would narrow its coverage and undermine its important purposes. *Lodis v. Corbis Holdings, Inc.*, 172 Wn. App. 835, 292 P.2d 779 (2013); see also RCW 49.60.010. Requiring a victim of discrimination to prove "pretext" is inconsistent with a substantial factor test. Under a "substantial factor" test a discriminatory motive does not have to be the "but for" cause of the adverse employment decision. See WPI 330.01. As expressed by Justice Madsen in her dissent in *Mackey*, 27 Wn. 2d at 312 the majority's

holding in that case adopted a standard which allows "for compensatory damages be awarded to an employee who may very well have been fired for legitimate reasons in any event." In other words under a "substantial factor" test a discrimination victim may nevertheless prevail, even if, there were legitimate grounds for terminating employment, so long as a "substantial factor" was an impermissible motive.

If our Courts were to require a showing a "pretext" at the summary judgment stage as a necessary element of proof it would undermine our Supreme Court's adoption of the causation "substantial factor test" applicable at time of trial because it would result in the potential dismissal of meritorious cases where even though there were legitimate reasons for the termination decision, nevertheless the evidence was suggestive of or that an illegal motive was a "factor" in the adverse employment decision. As the Court can take note, in some cases, a plaintiff may not be able to establish that the grounds for termination were "pretextual" but, nevertheless, may have evidence that an illegal motive otherwise existed, the legal motive, nevertheless, came into play.

The *Mackey* standard was intended to be "strong medicine" in our fight against discrimination within our society and workplace. As noted in *Mackey* at 310 "Washington's law against discrimination contains a sweeping policy statement strong and condemning many forms of

discrimination". By requiring a plaintiff to prove "pretext" at the summary judgment stage would be inconsistent with "Washington's disdain for discrimination", and it would be an action which could reduce it to "mere rhetoric".³

Here, it is again noted that the Appellant presented proof that could be characterized as both "direct" and circumstantial. Generally, in order for his establish a "prima facie case of disparate treatment" he must show (1) that he belonged to a protected class, (2) that he was treated less favorably in the terms and condition of his employment than similarly situated employees, and (3) he engaged in substantially similar work as non-protected class employees. See *Domingo v. Boeing Employees Credit Union*, 124 Wn. App. 71, 81, 93 P.3d 1222 (2004).

In order to establish "pretext" under Washington case law a plaintiff **can** show that the defendant's articulated reasons (1) have no basis in fact, (2) were not really motivating factors for the decision,

³ Though the plaintiff's case involved both "direct" and "circumstantial" evidence it is noted that the burden of establishing a prima facie case of disparate treatment is not onerous. *G. Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 67 L. Ed. 2d 207 (1981). "The requisite degree of proof necessary to establish a prima facie case ... is minimal and does not even need to rise to a level of preponderance of the evidence. *Fulton v. DSHS*, 169 Wn. App. at 152, quoting, *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 889 (9th Cir. 1994). The fact that the *McDonnell Douglas* case at its burden shifting approach involves a burden of production versus a burden of persuasion is an insufficient basis to apply a different approach at the summary judgment stage that otherwise then would be applicable at time of trial. Under any set of circumstances a plaintiff in response to a summary judgment always has an obligation to create a genuine issue of fact with respect to the existence of an improper motive. It simply makes no sense that in order to meet that task a victim of discrimination must present proof different than that which otherwise would be presented at time of trial.

(3) were not temporally connected to the adverse employment action, or (4) were not motivating factors in the employment decision for other employees in similar circumstances. *Fulton v. DSHS*, 169 Wn. App. at 161; *Scrivener v. Clark College*, 176 Wn. App. at 412.

Unlike this case, in *Fulton* it was expressly noted that the plaintiff in that case had "no direct evidence" of discriminatory motive. It is troubling to note that both in *Fulton* and *Scrivener* the term **must** is used when referring to these four considerations. The use of the term "**must**" is erroneous, because it does not take into consideration that there may be other ways of establishing "pretext" or that a question of fact can exist regardless of legitimate grounds for the adverse employment action. These four factors were initially articulated in *Sellsted v. Washington Mutual*, 169 Wn. App. 852, 851 P.2d 716, review denied, 122 Wn. 2d 1018, 863 P.2d 1352 (1993). Following *Sellsted* these factors were again discussed in *Kuyper v. State*, 69 Wn. App. 732, 738-39, 904 P.2d 793 (1995). In *Kuyper* and in *Chen v. State*, 86 Wn. App. 183, 190, 937 P.2d 612 (1997) this Court stated that "an employee **can** demonstrate ..." pretext by showing the above-referenced factors. The original use of the term "can", as opposed to "must" is of obvious significance. The use of the word "can" though it suggests that these factors were intended to be the exclusive methods for establishing "pretext", and leaves open the ability to

prove a question of fact regarding a discriminatory intent regardless of what methodology is utilized. Without explanation subsequent cases substituted the word "can" with the mandatory term "must". The substitution of the word "must" without a rational explanation or justification for a radical change in the law is perplexing, and is contrary to the legislative mandates and the underlying notion which animated the *McDonnell Douglas* test which is to be used to "flexibly" address facts in different cases. See *Johnson v. DSHS*, 80 Wn. App. 212, 227, n. 21, 907 P.2d 1223 (1996). As recognized in *Johnson*, the *McDonnell Douglas* test, does not have to be used if it would make the analysis needlessly complex or if the plaintiff has available other types of proof which could serve to establish a question of fact regarding the claim. *Id.*

The Court is obligated in order to meet statutory purposes to correct an erroneous branch of our jurisprudence, without explanation, made the above-referenced pretext factors mandatory versus discretionary. Further, on proper analysis, the Division 1 *Rice* opinion which was criticized in *Scrivener* is actually the correct application of the law and this Court's decision in *Scrivener* interjected needless confusion into this extremely important and highly sensitive area of the law.

As discussed in appellant's opening brief and further touched on below on proper application of the law this case never should have been

sent a dismissal particularly as it relates to plaintiff's disparate treatments and retaliation claims.

2. The Fact that Appellant's Union Chose not to Pursue his Grievance and the Fact of Crain's Previous 'Employee Misconduct' is Irrelevant because he was Exonerated related to the Patient's Death.

From a causation perspective, the fact that appellant's union chose not to grieve his termination after the fact is not relevant because he should have not been terminated in the first place. Had appellant not been terminated, there would have been nothing to grieve. The same is true of plaintiff's previous disciplinary record, it should have never been used against him to terminate him because he had no wrongdoing related to the events surrounding the patient's incident/death. Appellant's Last Chance Agreement should have never been implemented related to this event or used as a basis of termination since appellant's actions were completely exonerated.

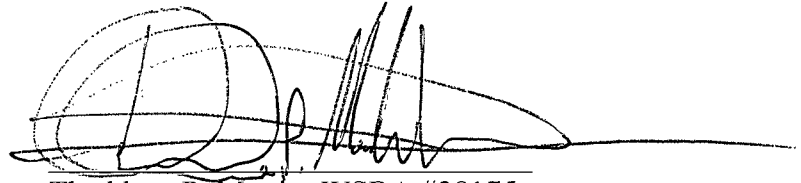
DSHS had no legitimate, non-discriminatory reason to otherwise terminate appellant since he did nothing wrong and was exonerated.

CONCLUSION

Further the reasons stated above and in appellant's opening brief the Trial Court's grant of summary judgment on this case on plaintiff's RCW 49.60 claims should be reversed and this matter remanded for trial.

There were facts presented to the Trial Court, if subject to proper analysis should have led the Trial Court to the reasonable conclusion that genuine issues of material fact precluded summary judgment in this matter. The Trial Court's failure to recognize as such was reversible error.

Executed this 14th day of February, 2017, at University Place,
Washington.

A handwritten signature in black ink, appearing to read 'Thaddeus P. Martin', is written over a horizontal line.

Thaddeus P. Martin, WSBA #28175
Attorney for Appellant

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CERTIFICATE OF SERVICE STATE OF WASHINGTON

I HEREBY CERTIFY THAT I AM NOT A PARTY TO THIS ACTION
AND THAT I PLACED FOR SERVICE OF THE APPELLANT'S
OPENING BRIEF TO THE COURT OF APPEALS, DIVISION II ON
THE FOLLOWING PARTIES IN THE FOLLOWING MANNER(S):

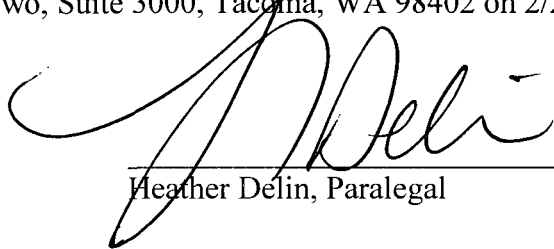
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[XXX] by causing a full, true, and correct copy thereof to be e-mailed to
the party at the above listed addresses, on the date set forth below
followed by legal messenger.

I declare under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct.

Executed at University Place, Washington on the 21st, day of February,
2017.

The original version was sent via ABC for delivery to the Court of
Appeals, Division Two, Suite 3000, Tacoma, WA 98402 on 2/21/17.


Heather Delin, Paralegal